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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MARIANO TORRES MENDEZ, Defendant and Appellant.	G040020 (Super. Ct. No. 05WF1393) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gary S. Paer, Judge. Affirmed as modified.

Brett Harding Duxbury, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Gil Gonzalez and Randall D. Einhorn, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted defendant Mariano Torres Mendez of witness intimidation (Pen. Code, § 136.1, subd. (c)),[1] aggravated assault (§ 245, subd. (a)) with great bodily injury (§ 12022.7, subd. (a)), three counts of active gang participation (§ 186.22, subd. (a)), possession of ammunition (§ 12316, subd. (b)(1)) and found allegations that defendant committed these crimes to benefit a criminal street gang (§ 186.22, subd. (b)) to be true. Defendant contends the trial court erred by instructing the jury to consider evidence of his pretrial oral statements with caution (Judicial Council of Cal. Crim. Jury Instns. (2006-2007) CALCRIM No. 358), and he is entitled to an additional seven days of presentence credit. The Attorney General concedes the latter issue. For the reasons expressed below, we direct the trial court to modify the judgment to correct defendant's sentencing credits and otherwise affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

On October 7, 2004, defendant, a leader in a Huntington Beach criminal street gang, punched 16-year-old D.G., knocking him off his bike and breaking his arm. The evidence demonstrated defendant assaulted D.G. either to force him to join the gang, or to retaliate for an earlier altercation between D.G. and defendant's brother.

In April 2005, D.G.'s friend, Rogelio Ruiz, witnessed a robbery committed by a member of defendant's gang. Ruiz was subpoenaed to testify on April 2, 2005; defendant drove to Ruiz's home and asked if he was going to testify. Ruiz said no. Two days later, Ruiz received a call from the prosecutor's office summoning him to court. As Ruiz walked to his car, defendant drove up, blocked Ruiz's car, and warned Ruiz if he went "to court, to be careful, because something [would] happen to [him] or [his] family," and then drove away. Ruiz believed defendant was a prominent leader of his

[1] All statutory references are to the Penal Code unless noted.

gang, and took defendant's threat seriously because defendant had joined his gang cohorts in an earlier assault on Ruiz for refusing to join defendant's gang. Ruiz did not go to court to testify. Instead, Ruiz moved out of his neighborhood.

A gang expert found ammunition during a search of defendant's residence in June 2005. The parties stipulated defendant was prohibited from possessing ammunition. The expert opined defendant actively participated in his gang at the time of the charged offenses, and committed the crimes to promote, benefit, and further criminal conduct by the gang. The expert believed defendant assaulted D.G. because the youth declined to follow D.G.'s brothers into the gang, and as a gang leader, defendant had assumed the responsibility to intimidate potential witnesses. At the time of his arrest, defendant admitted he knew D.G. through D.G.'s brothers. He also admitted he knew Ruiz, but denied threatening him.

Following a trial in August 2007, the jury convicted defendant of the crimes and enhancements listed above. The jury deadlocked on a count charging defendant with attempting to recruit D.G. into the gang. The court imposed an indeterminate life term with the possibility of parole (seven-year minimum) for witness intimidation for the benefit of a criminal street gang (§ 136.1; § 186.22, subd. (b)(4)(C)). The court also imposed a determinate midterm of three years for aggravated assault, plus a consecutive three-year term for causing great bodily injury, and concurrent terms on the remaining counts.

II

DISCUSSION

A. *The Trial Court Did Not Err in Instructing the Jury with CALCRIM No. 358*

The court instructed the jury with CALCRIM No. 358: "You have heard evidence that the defendant made oral or written statements before the trial. You must decide whether or not the defendant made any of these statements, in whole or in part. If

you decide that the defendant made such statements, consider the statements, along with all the other evidence, in reaching your verdict. It is up to you to decide how much importance to give to such statements. [¶] You must consider with caution evidence of a defendant's oral statement unless it was written or otherwise recorded."

Relying on *People v. Zichko* (2004) 118 Cal.App.4th 1055 (*Zichko*), defendant contends the instruction lessened the standard of proof concerning witness intimidation (§ 136.1, subd. (c)(1). In *Zichko*, the defendant was charged with making a criminal threat after he threatened to shoot the teller and bank manager. Defendant complained on appeal the trial court erred *by failing to instruct* the jury with CALJIC No. 2.71 that the statement constituting the threat should be viewed with caution. The court affirmed, holding the cautionary instruction should not be given when defendant's words constitute the crime itself because such a statement is not an "admission" as that term is legally defined.[2]

The court also reasoned that instructing with CALJIC No. 2.71 would have been "inconsistent with the reasonable doubt standard of proof. The purpose of CALJIC No. 2.71 is to direct the jury to use caution in deciding whether an admission was made. Here, as the trial court instructed, the People had the burden of proving Zichko guilty beyond a reasonable doubt and that he must be found not guilty unless the elements of the crime were proven beyond a reasonable doubt. Therefore, a guilty verdict required the jury to conclude beyond a reasonable doubt that Zichko made the threatening statements. To also instruct the jury that the statements 'should be viewed with caution' (CALJIC No. 2.71) would have been at least superfluous and may have been confusing to the jury.

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[2] The version of CALJIC No. 2.71 used in *Zichko* provided that "An *admission* is a statement made by [a] [the] defendant which does not by itself acknowledge [his][her] guilt of the crime[s] for which the defendant is on trial, but which statement tends to prove [his][her] guilt when considered with the rest of the evidence. [¶] You are the exclusive judges as to whether the defendant made an *admission*, and if so, whether that statement is true in whole or in part. [¶] [Evidence of an oral *admission* of [a][the] defendant not made in court should be viewed with caution.]" (Italics added.)

It could have misled the jury into believing that it could find Zichko guilty even if it did not conclude beyond a reasonable doubt that the statements were made, as long as the jury exercised 'caution' in making its determination." (*Zichko, supra*, 118 Cal.App.4th at p. 1060.)

Here, unlike the defendant in *Zichko*, defendant made "admissions" to the police officer that he knew D.G. and Ruiz. Defendant took no action to limit the instruction to particular statements. (See *People v. Coffman* (2004) 34 Cal.4th 1, 122 [defendant may not complain on appeal trial court erred in failing to clarify a legally correct jury instruction unless he requested such clarification in the trial court].) Consequently, the trial court did not err in giving CALCRIM No. 358.

Moreover, even if we agreed CALCRIM No. 358 should not be given when defendant's words constitute the crime,[3] an instruction the jury should view a defendant's statement with caution *benefits* the defendant because it warns the jury that before it considers the content of the statement it should determine whether the defendant actually made it. Because the trial court instructed the jury to consider all the instructions together (CALCRIM No. 200), and the court correctly instructed on the elements of the crime (CALCRIM Nos. 2622, 2623) and the prosecution's burden to prove each element of the crime beyond a reasonable doubt (CALCRIM Nos. 103, 220), we conclude a reasonable juror would not interpret CALCRIM No. 358 as lowering the prosecution's burden of proof. Defendant therefore could not have been prejudiced by an instruction advising the jury to use caution in considering evidence concerning his oral statements.

B. *Defendant Is Entitled to Additional Presentence Custody and Conduct Credit*

Defendant argues he is entitled to 1097 days of presentence credit, rather than the 1090 days the trial court awarded him at sentencing. The Attorney General

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[3] CALCRIM No. 358, unlike CALJIC No. 2.71, expressly applies to "statements" rather than "admissions." Defendant has not argued CALCRIM No. 358 misstates the law.

concedes the issue. The record reflects defendant was arrested and presumably booked into jail on June 2, 2005, and sentenced on January 11, 2008. Defendant was entitled to 954 rather than 948 days actually spent in custody. He was also entitled to conduct credits of 143 days rather than 142 days. (See § 2933.1 [person convicted of violent felony under section 667.5, subdivision (c) may accrue no more than 15 percent conduct credit].)

III

DISPOSITION

The abstract of judgment is ordered modified to reflect 954 days of actual custody credit and 143 days of conduct credit, for a total of 1097 days credit. The judgment is affirmed as modified. The clerk of the superior court is ordered to forward a copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation, Division of Adult Operations.

ARONSON, J.

WE CONCUR:

MOORE, ACTING P. J.

FYBEL, J.